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Petition

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81-908

No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD M. SPIELER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a warrantless search, based upon probable cause, of a closed but unsealed paper bag, found in the trunk of respondent's automobile during a lawful search of the automobile, was permissible under the Fourth amendment.

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EDWARD M. SPIELER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review judgment of the United States Court of Appeals for the Eleventh Circuit in this case.[1]

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-15a) is reported at 646 F.2d 955. The district court rendered no opinion.

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[1] The opinion of the court of appeals was rendered by a panel of Unit B of the United States Court of Appeals for the Fifth Circuit prior to the commencement of operations by the Eleventh Circuit.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 16a) was entered on June 24, 1981. An order denying petitions for rehearing (App. C, *infra*, 17a-18a) was entered on August 19, 1981. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A 19-count indictment filed in the United States District Court for the Southern District of Florida on April 2, 1980, charged respondent and his co-defendants Matthew J. Moschetta and Gerald Deutsch with commission of various firearm offenses, in violation of 18 U.S.C. 922(b)(5), (c)(2); 26 U.S.C. 5861(c), (d), (f), (i); and 26 U.S.C. 5871, and with conspiracy to commit the offenses, in violation of 18 U.S.C. 371. Prior to trial, respondent and Moschetta moved to suppress evidence seized by agents of the Bureau of Alcohol, Tobacco and Firearms (ATF) during a warrantless search of respondent's automobile.[2] Following a hearing before a magistrate, the district court granted the suppression motions. The court of appeals affirmed in part and reversed in part as to respondent, and reversed as to Moschetta (App. A, *infra*, 15a).[3]

1. As reflected in the court of appeals' opinion (App. A, *infra*, 2a-6a), evidence developed during the suppression hearing showed that in September 1978 ATF agents received information from a reliable informant that respondent was manufacturing

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[2] Moschetta claimed that he had automatic standing to contest the search and seizure of respondent's efforts under *Jones* v. *United States*, 362 U.S. 257 (1960).

[3] Moschetta is accordingly not a respondent herein.

illegal silencers in a machine shop in which he was employed, and distributing them in the South Florida area. Two months later, Gregorio Suarez informed the agents that Gerald Deutsch, his co-worker, had told him that illegal silencers and weapons were available for purchase if he was interested. At the agents' request, Suarez accompanied Deutsch to a gun shop operated by Moschetta. When silencers were discussed, Moschetta stated that his man "Ed" made the best, and that he could furnish one attached to a pistol for $1,000. On December 9, 1978, and again on December 20, 1978, Moschetta delivered a .22 caliber pistol with a silencer attached to Suarez in return for a payment of $1,000. On the first occasion, the weapon was delivered in a paper bag (*id.* at 2a-3a).

On February 20, 1979, Suarez and an undercover ATF agent met Moschetta and ordered an "assassination kit" and an AR7 rifle with attached silencer.[4] Several days later they furnished Moschetta a dark grey Samsonite briefcase to be used in construction of the kit. On February 24, 1979, after Moschetta notified Suarez that the silencer would be delivered that evening, ATF agents began surveillance of the machine shop where respondent was employed. At approximately 4:15 p.m., the agents observed re-

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[4] An assassination kit is an automatic pistol with attached silencer inside a briefcase with a spring triggering device for firing the weapon without opening the briefcase.

App. A, *infra*, 3a n.2.

> An AR7 rifle is a .22 caliber rifle capable of being broken down with the trigger assembly and barrel [being] placed in the stock [and thus,] becoming a portable weapon in a small package.

Id. at 4a n.3.

spondent leaving the building carrying a brown paper bag and a dark grey briefcase similar to the one that had been furnished to Moschetta for the assassination kit, and placing these items in the trunk of his automobile. As respondent began to drive away, the agents blocked his path and ordered him from his vehicle. One of the agents took the keys from the ignition and opened the locked trunk. Inside the agents saw an ammunition box, the grey briefcase, a number of paper bags, and the stock of an AR7 rifle. The agent opened the closest of the paper bags and found that it contained silencers. After interrupting the search to advise respondent that he was under arrest, the agent opened the briefcase. As he explained in the suppression hearing, the agent opened the briefcase on the spot because he believed that it contained an assassination kit, which would be dangerous to transport unless first disarmed. However, the briefcase did not contain an assassination kit but instead held loaded handguns and a threaded AR7 barrel. At no time during these events did agents secure a search warrant. (App. A, *infra*, 3a-6a.)

On the basis of the foregoing facts, the magistrate recommended that respondent's motion to suppress the contents of the briefcase and the closed paper bag, as well as the AR7 rifle stock, be granted. He concluded that probable cause to search those items existed, but that the search was unlawful because of the agent's failure to procure a search warrant. The magistrate also concluded that Moschetta had automatic standing to contest the search of the items seized from respondent's automobile. See note 2, *supra*. The district court adopted both recommendations (App. A, *infra*, 6a).

2. On appeal, the court of appeals reversed the grant of Moschetta's suppression motion, concluding that he lacked standing to contest the seizures (App. A, *infra*, 15a).[5] The court of appeals also reversed as to respondent's briefcase and the rifle stock (*id.* at 8a-9a).[6] Suppression of the silencers found in the paper bag was affirmed, however, even though the court determined that the ATF agent had probable cause to believe respondent was carrying contraband silencers in his automobile (*id.* at 7a-8a, 9a).

Relying upon the decision of the en banc court in *United States* v. *Ross*, 655 F.2d 1159 (D.C. Cir. 1981), cert. granted, No. 80-2209 (Oct. 13, 1981), the court below declined to distinguish, for purposes of the Fourth Amendment Warrant Clause, between luggage and other common repositories for personal effects, on the one hand, and less substantial plastic or paper containers that are not as strongly associated with expectations of privacy, on the other (App. A, *infra*, 9a-15a). Instead it held, "in line with *Ross*, that [*Arkansas* v.] *Sanders*, [442 U.S. 753 (1979)] does not establish a 'luggage rule' or by

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[5] The court of appeals erroneously referred to Moschetta as a cross-appellant (App. A, *infra*, 15a). The two appeals before the court of appeals were both government appeals. Each challenged the suppression of evidence by the district court. The second appeal was occasioned by the district court's reaffirmation of its suppression ruling in response to renewed suppression motions prompted by the filing of a superseding indictment.

[6] The court held that the well-founded belief of the agents that the briefcase contained a loaded spring triggered pistol clearly established an exigent circumstance permitting an immediate search of its contents (App. A, *infra*, 8a-9a). The seizure of the rifle stock was upheld because it was found in plain view during the search of the trunk (*id.* at 8a).

implication an 'unworthy container' exception, but that it requires the police to obtain a warrant before searching any closed opaque container whose exterior or shape does not disclose its probable contents" (*id.* at 7a, citing *United States* v. *Ross*, *supra* (Wilkey, J., dissenting on other grounds)). Noting that "[t]he brown paper bag involved here was closed, had no exterior markings, disclosed nothing by its shape, was not suspected of containing anything dangerous to those nearby and had no cracks, rips or tears" (*id.* at 15a), the court of appeals affirmed suppression of the contents of the bag.

REASONS FOR GRANTING THE PETITION

The question presented by this case is identical to that presented in *United States* v. *Ross*, cert. granted, No. 80-2209 (Oct. 13, 1981). Here, as in *Ross*, the court held that although the police could properly conduct a warrantless search of the trunk of respondent's automobile for contraband, it was improper for them, without a warrant, to open a paper bag found in the trunk in the course of the search. The court below observed that "the [*Ross*] Court faced a situation both on the law and the facts not meaningfully distinguishable from our own" (App. A, *infra*, 9a), and it grounded its decision directly upon *Ross*.

As in our petition in *Ross*, a copy of which has been provided to counsel for respondent, we contend here that paper pags and other similar containers lack the integrity, security and privacy attributes of luggage and other conventional repositories of personal effects. Accordingly, such containers cannot support a legitimate expectation of privacy sufficiently strong to evoke the protection of the War-

rant Clause, in circumstances where such a container is lawfully seized during a search of an automobile. The question presented by this case and *Ross* constitutes an important and recurring question of Fourth Amendment law that should be resolved by this Court. Now that the Court has granted our petition in *Ross*, it would appear appropriate to hold this petition pending the disposition of *Ross*.

CONCLUSION

The Court should dispose of this petition in light of its disposition of *United States* v. *Ross*, No. 80-2209.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1981

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT B

Nos. 80-5270, 80-5475

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

MATTHEW J. MOSCHETTA and EDWARD M. SPIELER,
DEFENDANTS-APPELLEES

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

MATTHEW J. MOSCHETTA, EDWARD M. SPIELER
and GERALD DEUTSCH, DEFENDANTS-APPELLEES

June 1, 1981

Appeals from the United States District Court
for the Southern District of Florida

Before DYER, TJOFLAT and FAY, Circuit Judges.

FAY, Circuit Judge:

Appellant, the United States of America, seeks reversal of the District Court's affirmation of the Magistrate's report and recommendation for the suppression of evidence seized by agents of the Bureau of Alcohol, Tobacco and Firearms from appellee's, Edward Spieler, automobile. Finding that the war-

rantless search of the trunk of the automobile was proper, that exigent circumstances justified the warrantless search of a briefcase in that trunk, but that the Supreme Court of the United States ruling in *Arkansas* v. *Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) requires the police to obtain a warrant before searching any closed opaque container (in this instance a brown paper bag) whose exterior or shape does not disclose its probable contents, we affirm in part and reverse in part the District Court's action.

I.

In November, 1978 Gregorio Suarez, upon referral by the Hialeah Police Department, Hialeah, Florida, contacted Bureau of Alcohol, Tobacco and Firearms' (ATF) agents Wilhjelm and Brady in regards to the distribution of illegal silencers and weapons in South Florida. Suarez stated that he had been approached by Gerald Deutsch, a man under Suarez's supervision at his place of employment, who stated that such contraband was for sale if Suarez was interested. ATF agents instructed Suarez to pursue the offer.[1]

As a result Suarez went with Deutsch to Calamity Jane's Gunshop where he met Matthew Moschetta. Suarez related to the agents that when silencers were discussed Moschetta said that his man "Ed" made

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[1] ATF agent Wilhjelm had received information in September of the same year from a reliable confidential informant that an Edward Spieler was manufacturing 70 percent of the quality silencers in the South Florida area and that Spieler worked in a machine shop and that probably his employer did not know since Spieler was probably doing it after hours or on weekends. *Record, Suppression Hearing* at 9-12, 38-42.

the best and that he could supply one attached to an automatic pistol for $1,000.00. Suarez also related to agents that Deutsch indicated that "Ed" and Moschetta were ex-partners in the gun business, that "Ed" had quoted to Deutsch a lower price but since he no longer had "Ed's" phone number they had to deal through Moschetta.

Subsequently on December 9, 1978 Moschetta delivered to Suarez one silencer with attached .22 automatic in a brown paper bag for $1,000.00. ATF investigation and surveillance continued. On December 19, 1978 Suarez telephoned Moschetta and asked when a second silencer would be ready and Moschetta stated, "just a moment, my man Ed is here at this time, I'll ask him." *Record, Suppression Hearing* at 24. Surveillance of the Calamity Jane Gunshop indicated that Edward Spieler had entered the shop while Moschetta was there on the afternoon of the call. No one else had been observed on the premises during that visit, although the agent testifying at the suppression hearing indicated that he did not know whether there was also a back door to the shop. At any rate, on December 20, 1978 Moschetta delivered a .22 automatic pistol with a silencer attached to Suarez in return for $1,000.00.

On January 13, 1979 Suarez and Moschetta again met at the gunshop and Moschetta said that he had a "friend" who could make an assassination kit.[2] In response to this offer on February 20, 1979 Suarez, accompanied by undercover agent Volaska, met Moschetta and ordered an assassination kit as well

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[2] An assassination kit is an automatic pistol with attached silencer inside a briefcase with a spring triggering device for firing the weapon without opening the briefcase.

as an AR7 rifle with attached silencer.[3] Two days later they delivered to Moschetta a dark gray Samsonite briefcase to be used in the construction of an assassination kit. The briefcase was an ordinary business model and without any exterior distinguishing marks. The only identifying mark placed on it was on the inside hinge. This was visible only under close observation with the briefcase opened.

On Saturday, February 24, 1979, Suarez told agent Wilhjelm that Moschetta had called and indicated that Suarez could expect delivery of the silencers that evening. Pursuant to this information agent Wilhjelm began surveillance of Spieler. He set up constant surveillance of the machine shop and Spieler's car after he noticed that the car had been moved from Spieler's home to the shop. At approximately 4:15 p.m. the surveilling agents saw Spieler leaving the building carrying a brown paper bag and a dark gray briefcase. He placed these items in the trunk of his automobile, went back into the building, returned shortly thereafter and got into the car. The agents testified that at that point they believed Spieler was carrying the assassination kit briefcase which had been provided to Moschetta.

As Spieler began to back the car up, the agents blocked his path with one of their vehicles. Then with drawn guns they approached his car and ordered Spieler from his vehicle. At that point agent Wilhjelm took the keys from the ignition and without Spieler's consent, opened the locked trunk of the vehicle. Inside he saw an ammunition box, a gray briefcase, a number of paper bags and miscellaneous items in-

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[3] An AR7 rifle is a .22 caliber rifle which is capable of being broken down with the trigger assembly and barrel placed in the stock becoming a portable weapon in a small package.

cluding what appeared to be the stock of an AR-7 rifle. He then "opened up the brown paper bag, the first one that was right next to [him] and . . . found three metal devices that were silencers. . . ." *Record, Suppression Hearing* at 31. With this discovery, agent Wilhjelm temporarily halted his search and advised Spieler that he was under arrest and that his vehicle would be seized.[4]

Thereafter, agent Wilhjelm opened the briefcase. As to his motives he testified that:

> . . . I opened up the briefcase because I thought it contained—it was the Government briefcase, that it did contain an assassination kit which would include a loaded weapon with a triggering device and I wanted to make it secure, plus to ascertain for sure that it was the one.

Record, Suppression Hearing at 20. He further stated that such actions were consistent with procedure.[5] However, the briefcase did not contain the assassination kit but rather loaded handguns, personal effects and the barrel for the AR7 that had been threaded.

The agents did not attempt to secure an arrest or search warrant during either the surveillance or

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[4] During agent Wilhjelm's initial search of the trunk, the agents holding Spieler conducted a frisk and found a loaded .38 pistol in Spieler's left boot.

[5] Q Is [an assassination kit] something that you would normally transport unopened?

A No, sir. Anything that contains a weapon, and especially one that's in a briefcase like that that's hooked up by springs and so forth, I would examine it first and make sure that it was unloaded before I transported it.

Record, suppression Hearing at 33.

the stop and search of Spieler's automobile. Accordingly, after a hearing, the Magistrate recommended to the District Court that appellee's motion to suppress all evidence seized from the trunk be granted despite the fact that probable cause existed for a warrant had it been sought. The Magistrate also ruled that appellee, Moschetta had automatic standing under *Jones* v. *United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) and *United States* v. *Reyes*, 595 F.2d 275 (5th Cir. 1979). The District Court affirmed both recommendations. The United States appeals both decisions.

II

At principal issue is the application of *Arkansas* v. *Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) and *United States* v. *Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) to the search of containers found in appellee's trunk. These decisions, and specifically *Sanders*, established that, absent exigent circumstances, the police are required to obtain a search warrant before opening and searching any type of luggage, locked or unlocked, taken from an automobile which has been properly stopped and searched, without a warrant but on probable cause, for contraband. As stated by Judge Ginsburg in *United States* v. *Ross*, —— F.2d ——, No. 79-1624 (D.C. Cir. March 31, 1981) (*en banc*), a case involving a similar stop and search for contraband, "[t]he case before us raises the question whether *Sanders* establishes only a 'luggage rule' or whether the reasoning of that decision extends as well to other containers used to carry personal belongings and effects, containers smaller, less solid, or less durable than those on sale in a luggage shop." At

——. We conclude, in line with *Ross*, that *Sanders* does not establish a "luggage rule" or by implication an "unworthy container" exception, but that it requires the police to obtain a warrant before searching any closed opaque container whose exterior or shape does not disclose its probable contents. *United States* v. *Ross*, —— F.2d at ——, (Wilkey, J. dissenting on other grounds). *See* 422 U.S. at 764-65, n.13, 99 S.Ct. at 2593-2594.

In *Sanders* police officers acting on an informant's tip placed the Little Rock, Arkansas Airport under surveillance specifically for the defendant and a green suitcase allegedly containing marijuana. As predicted Sanders appeared and after retrieving a green suitcase from the airlines baggage claim he gave it to a companion who placed it in a waiting taxi's trunk. When the taxi drove away carrying the suitcase and the companions the police pursued and stopped it. At the request of the police, the taxi driver opened the trunk and without asking permission the police opened the unlocked green suitcase and discovered 9.3 pounds of marijuana. Subsequent to this discovery the individuals were arrested.

The Supreme Court upheld the warrantless stop and search of the taxi's trunk for contraband based upon the long standing "automobile exception" to the warrant requirement. *See, e.g., United States* v. *Martinez-Fuertes*, 428 U.S. 543, 555, 561-62, 96 S.Ct. 3074, 3081, 3084, 49 L.Ed.2d 1116 (1976); *United States* v. *Ortiz*, 422 U.S. 891, 896, 95 S.Ct. 2585, 2588, 45 L.Ed.2d 623 (1975); *Chambers* v. *Maroney*, 399 U.S. 42, 49-50, 90 S.Ct. 1975, 1980, 26 L.Ed.2d 419 (1970); *Carroll* v. *United States*, 267 U.S. 132, 153, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925). So, too, were agent Wilhjelm's actions proper in the present case. He had ample probable cause to believe

that Spieler was carrying contraband in his car, specifically an assassination kit and silencers, based upon (1) Suarez's most recent communication, (2) Suarez's previous dealings with Moschetta, (3) the confidential informant's tip on Spieler and (4) the agents own observations of the suspect. Further, once lawfully in the trunk the police could properly seize and use at trial any articles in "plain view" within the trunk, i.e. the stock of the AR7 rifle. *See, e.g., United States* v. *Biswell*, 406 U.S. 311, 317, 92 S.Ct. 1593, 1597, 32 L.Ed.2d 87 (1972); *Harris* v. *United States*, 390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067 (1968) (*per curiam*); *United States* v. *Brannon*, 616 F.2d 413, 416 (9th Cir. 1980), *cert. denied*, 447 U.S. 908, 100 S.Ct. 2993, 64 L.Ed.2d 858 (1981); *United States* v. *Newbourn*, 600 F.2d 452, 456 (4th Cir. 1979). Therefore, the District Court's suppression of this article of evidence must be reversed.

Turing to the seizure of appellee's briefcase it is clear that, absent exigent circumstances, *Sanders* would apply to a Samsonite briefcase as surely as it would to a small Samsonite suitcase. *See United States* v. *Sutton*, 636 F.2d 96, 100 (5th Cir. 1981). *See also, Sanders*, 442 U.S. at 764-65 n.13, 99 S.Ct. at 2593-2594; *Ross*, —— F.2d at —— n.2 (Tamm, J. dissenting); *cf. United States* v. *Schleis*, 582 F.2d 1166, 1172 (8th Cir. 1978) (upon remand for reconsideration in light of *Chadwick*). However, in this instance we have testimony clearly setting out an exigent circumstance. Agent Wilhjelm stated his belief that the briefcase contained a dangerous instrumentality, i.e. a loaded spring triggered pistol. In light of this belief it would be indeed foolhardy, as this Court has previously noted, to delay a search of such containers. *See United States* v. *Johnson*, 588 F.2d 147, 151 n.5 (5th Cir. 1979). There is ample

support for the validity of such a search and for the use of any evidence gained during such search at trial. *See Sanders*, 442 U.S. at 763-64 n.11, 99 S.Ct. at 3592-2593; *United States* v. *Chadwick*, 433 U.S. 1, n.9, 97 S.Ct. 2476, 2485, 53 L.Ed.2d 538 (1977); *Cady* v. *Dombrowski*, 413 U.S. 443, 447-448, (1972); *Ross*, —— F.2d at ——; *United States* v. *Newbourn*, 600 F.2d 452, 456 (4th Cir. 1979). Therefore the District Court's suppression of evidence found in appellee's briefcase must also be reversed.

We reach the most difficult determination, the suppression of three silencers found by agent Wilhjelm in a closed brown paper bag. This path has most recently been trod by the United States Circuit Court for the District of Columbia, *en banc*, and the opinions expressed therein appear to be fairly all encompassing. In *United States* v. *Ross*, —— F.2d —— (D.C.Cir. March 31, 1981) the Court faced a situation both on the law and the facts not meaningfully distinguishable from our own. Acting on a tip from a confidential informant that Ross was selling narcotics and that the contraband was in the trunk of his car, District of Columbia police sought, found and stopped Ross. They arrested him after a search inside the auto uncovered a pistol in the glove compartment. The police then took Ross's keys, opened and searched the car's trunk. They found in it side by side a closed but unsealed brown paper bag and a zippered 7″ × 8″ × 2″ red leather pouch. The police opened the bag and discovered thirty glassine envelopes later determined to contain heroin. Then they opened the pouch and discovered $3200 in currency. At no point had the officers sought a search warrant. The District Court denied the motion to suppress and a panel of the D.C. Circuit affirmed

this decision in regard to the paper bag because it was closed but unsealed. However, it reversed, on the strength of *Sanders*, the decision as to the zippered pouch. *Ross*, —— F.2d at ——. Factually, absent exigent circumstances, this Court would also be faced with side by side containers in a trunk which could conceivably be distinguished as the panel did in *Ross*. In fact, the government urges us to make this distinction. Further, the government urges that our own precedent indicates that such a determination is possible.

In *United States* v. *Rigales*, 630 F.2d 364, 367-68 (5th Cir. 1980) this Court, applying *Sanders*, reversed a conviction, for receiving a pistol while a convicted felon, upon the warrantless search of a zippered leather case which contained a firearm. Judge Gee, writing for the Court, reasoned that since no evidence had been adduced which indicated that the contents of the case could be inferred from its outward appearance, the owner's expectation of privacy in the contents should be accorded Fourth Amendment protection. *Id.* at 368.

On the other hand in *United States* v. *Sutton*, 636 F.2d 96 (5th Cir. 1981) this Court upheld the warrantless search of a paper sack which had on the exterior an inscription identifying it as coming from a particular pharmacy, which sack was found "lying with a corresponding indifference toward any expectation of privacy, in full view on the front floorboard" of an automobile lawfully stopped for contraband. *Id.* at 100. The opinion does not state that the sack, which held the specific items of controlled substances whose sale triggered the stop and search, was closed or not. It is noteworthy that evidence obtained in a warrantless search of a briefcase found

in the trunk of the automobile was suppressed by the court under *Sanders*. The government's arguments notwithstanding, we conclude that the paper sack in *Sutton* is distinguishable from the paper bag before us on the grounds that the contents of that sack were in "plain view", *see* 636 F.2d at 99. Therefore, we find ourselves in precisely the same position as that faced by the en banc D. C. Circuit Court in *Ross* contemplating a closed paper bag alongside a clearly protected, absent exigent circumstances, more durable container.

Several of our sister courts have found that there is a lower expectation of privacy in various plastic and paper containers based upon an implication that *Sanders* can be limited to a rule applicable to only durable containers.[6] Yet, as pointed out by the *Ross* majority, most of these decisions relied at least in part upon the discredited reasoning of the *Ross* panel[7] which distinguished a leather pouch from a paper bag. Although a difficult call, we refuse to create a blanket exception to the Fourth Amendment for paper bags but rather base our holding upon

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[6] *See, e.g., United States* v. *Mannino*, 635 F.2d 110 (2d Cir. 1980) (plastic bag); *United States* v. *Mackey*, 626 F.2d 684 (9th Cir. 1980) (paper bag); *United States* v. *Blair*, 493 F.Supp. 398, 416 (D.Md. 1980) (cardboard boxes). *Cf. United States* v. *Brown*, 635 F.2d 1207 (6th Cir. 1980); *United States* v. *Jimenez*, 626 F.2d 39, 41 (7th Cir. 1980) (no expectation of privacy in paper bag on facts of this case, but facts in another case could show such an expectation), *petition for cert. filed*, 49 U.S.L.W. 3429 (U.S. Nov. 20, 1980) (No. 80-817); *United States* v. *Goshorn*, 628 F.2d 697 (1st Cir. 1980) (remand for evidence whether defendant had expectation of privacy in paper bags).

[7] —— F.2d at ——, n.16.

those principles established by the Supreme Court for containers in general.

First and foremost we do not find the government drawn "implications" in *Sanders* to be of much substance. The argument goes that the important characteristic of luggage in both *Chadwick* and *Sanders* is that "luggage is a common repository for one's personal effects and therefore is inevitably associated with the expectation of privacy." 442 U.S. at 762, 99 S.Ct. at 2591. The government argues that paper bags, and the like, are neither *common* repositories nor *inevitably* associated with expectations of privacy. But this is to make an absolute out of mere descriptors and to narrowly construe Fourth Amendment protections, rather than its exceptions. Such reasoning would place an entire body of law upon its head.

As pointed out in *Sanders* itself, the Court has declared only a few "jealously and carefully drawn", *Jones* v. *United States*, 357 U.S. 493, 499, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958), exceptions to the warrant requirement "where the societal costs . . . outweigh the reasons for prior recourse to a neutral magistrate." 442 U.S. at 759, 99 S.Ct. at 2592. *See United States* v. *United States District Court*, 407 U.S. 297, 318, 92 S.Ct. 2125, 2137, 32 L.Ed.2d 752 (1972). These few situations which necessarily impinge on the protective purposes of the Fourth Amendment "have been carefully delineated and the burden is on those seeking the exemption to show the need for it." 442 U.S. at 760, 99 S.Ct. at 2591, *quoting United States* v. *Jeffers*, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59 (1951).

Notwithstanding these clearly overriding principles, the government argues that *Sanders*, in foot-

note 13, provides for less protection of certain non-luggage type containers. We do not disagree with this conclusion as much as with the government's arguments as to the *nature* of these less protected containers. The footnote appears clear to us, it states:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. See *Harris* v. *United States*, 390 U.S. 234, 236 [88 S.Ct. 992, 993, 19 L.Ed.2d 1067] (1968) (*per curiam*). There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.

442 U.S. at 764-65, n.13, 99 S.Ct. at 2593.

This footnote does not articulate a distinction based upon durability or common usage as much as one wherein the contents of the container are in "plain view" either directly or by the outward appearance of the container. Any other interpretation

smacks of legerdemaining to avoid an unpleasant result due to the existence of the Exclusion Rule.

Indeed, the administrative difficulties for the police engendered by the *Sanders* decision may give one pause to wonder whether our legal abstractions have outrun common sense. At present the court will allow police to stop and search an entire automobile for contraband without a warrant, but require the police to stop that search and obtain a warrant upon reaching any closed opaque container whose exterior or shape does not disclose its probable contents. To the policeman or citizen, untrained in legal principals, this might seem anomalous, yet for us to allow some but not all containers to be protected by distinguishing "felt, vinyl, canvas, tinfoil, cardboard, or paper containers from leather; sacks closed by folding a flap from those closed with zippers, drawstrings, buttons, snaps, velco fastenings, or strips of adhesive tape", *Ross*, —— F.2d at ——, would be to cause worse confusion.[8]

The Supreme Court has clearly declined to extend the *Carroll* and *Chambers* "automobile exception" to allow warrantless searches of everything found within an automobile. 442 U.S. at 762-63, 99 S.Ct. at 2591-92. The principles which provided for this decision, specifically the need for only jealously and

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[8] Certainly some people in our society do use paper sacks and the like for receptacles of personal effects, even if the majority do not. *See Ross*, —— F.2d at —— n.30; and at —— (Mackinnon, J. dissenting). Any new expectation of privacy analysis which in effect circumvents the rationale of *Sanders, see Ross*, —— F.2d at ——-——, (Tamm, J. dissenting) necessarily implies the denigration of the privacy interests of such people. *See generally*, Hinson, *Warrantless Search of Automobiles, Exception Without Justification*, 32 *Hastings L.J.* 127 (1980).

carefully delineated exceptions to the warrant requirement, also mandate that the line drawn be a solid one and not one frittered away by esoteric distinctions. The brown paper bag involved here was closed, had no exterior markings, disclosed nothing by its shape, was not suspected of containing anything dangerous to those nearby and had no cracks, rips or tears.[9] Therefore the District Court's decision to suppress the evidence found in this brown paper bag under these circumstances is affirmed.

III.

Finally, in regards to cross-appellant Moschetta's argument that he has standing to complain of the search and seizure of Spieler's effects, we conclude that the grant of automatic standing under *Jones* v. *United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) must be reversed. Under *United States* v. *Salvucci Jr.*, —— U.S. ——, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), Moschetta does not have recourse to the rule for automatic standing and we find that no rights of Moschetta were violated.[10] *See Rakas* v. *Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *Alderman* v. *United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 966, 22 L.Ed.2d 176 (1969).

The decision of the District Court is AFFIRMED in part, REVERSED in part and REMANDED.

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[9] We note that we are not dealing with a situation wherein a law enforcement official lawfully picks up or carries a container and can clearly detect by feel the contents.

[10] *See generally*, Williamson, *Fourth Amendment Standing and Expectations of Privacy: Rakas* v. *Illinois and New Directions For Some Old Concepts*, 31 *U.Fla.L.Rev.* 831 (1979).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 80-5270 & 80-5475

D.C. Docket No. CR-79-307-ALH

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

versus

MATTHEW J. MOSCHETTA, EDWARD M. SPIELER, GERALD DEUTSCH, DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Southern District of Florida.

Before DYER, TJOFLAT and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

June 24, 1981

Issued as Mandate: Aug. 26, 1981

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT B

No. 80-5270

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

versus

MATTHEW J. MOSCHETTA and EDWARD M. SPIELER,
DEFENDANTS-APPELLEES

No. 80-5475

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

versus

MATTHEW J. MOSCHETTA, EDWARD M. SPIELER
and GERALD DEUTSCH, DEFENDANTS-APPELLEES

Appeals from the United States District Court
for the Southern District of Florida

Filed Aug. 19, 1981

Before DYER, TJOFLAT and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Appellee Spieler in the above entitled and numbered cause be and the same is hereby denied.

IT IS FURTHER ORDERED that the petition for rehearing filed on behalf of the Appellant in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
United States Circuit Judge

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Opposition

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

81-908

NO.

in the Supreme Court of the United States

October Term, 1981

UNITED STATES OF AMERICA,
Petitioner,

vs.

EDWARD M. SPIELER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STEADMAN S. STAHL, JR.
H. DOHN WILLIAMS, JR.
2432 Hollywood Boulevard
Hollywood, Florida 33020
(305) 923-1548
Attorneys for Respondent

QUESTION PRESENTED

WHETHER A RANDOM SEARCH OF NUMBER OF CLOSED PAPER BAGS FOUND IN THE LOCKED TRUNK OF THE RESPONDENT'S AUTOMOBILE WAS PERMISSIBLE UNDER THE FOURTH AMENDMENT?

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United States Constitution,
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NO.

in the Supreme Court of the United States

October Term, 1981

UNITED STATES OF AMERICA,
Petitioner,

vs.

EDWARD M. SPIELER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of the Petitioner, has asked this Honorable Court to review a judgment of the United States Court of Appeals for the Eleventh Circuit reported at 646 F.2d 955 (See App. A of Petition). The writ should not be granted, nor the cause reviewed for the reasons set forth below.

JURISDICTION

The jurisdiction for filing this Brief in Opposition is conferred pursuant to Rule 22, Supreme Court Rules. The Petition for a Writ of Certiorari was received on or about November 18, 1981.

STATEMENT

The Respondent was indicted with Matthew J. Moschetta and Gerald Deutsch for various firearm violations. Prior to trial, the Respondent moved to suppress the items seized from closed containers in the locked trunk of his automobile. The District Court and Magistrate suppressed all the items seized from the closed containers in the trunk of the automobile. The Court of Appeals affirmed the suppression of the search of the closed paper bags. However, the Court of Appeals reversed the suppression of the closed briefcase finding that the search came within the narrow exception set forth in footnote 11 of this Court's opinion in *Arkansas v. Sanders* 442 U.S. 756 (1976).

In September, 1978, ATF agents received unsubstantiated information from an *unreliable* confidential informant that the Respondent was manufacturing silencers in South Florida at a machine shop where he worked. The Court of Appeals incorrectly found, at footnote 1 of its opinion, that the information was from a *reliable* informant. When the record reflects the agent had no knowledge of the reliability of his informant's source of information (App. A., *infra*).

Two months later, Gregorio Suarez was introduced to the ATF agents. He agreed to work as a confidential

informant after telling them that Gerald Deutsch, a co-worker of his, said he could obtain illegal silencers.

Suarez went to a gun shop with Deutsch and was introduced to Matthew J. Moschetta. Suarez related to the agents that Moschetta said his man "Ed" made the best silencers. Deutsch explained to Suarez that "Ed" and Moschetta had been partners in the gun shop. The name EDWARD SPIELER was never mentioned, nor did Suarez ever meet with EDWARD SPIELER.

On December 9th and 20th, 1978, Suarez went to Moschetta's gun shop and on each occasion received a .22 cal. pistol with silencer attached in return for payments of $1,000.00.

Two months later, on February 20, 1979, Suarez and an undercover agent went to Moschetta's gun shop and ordered an "assassination kit" and an AR-7 rifle with attached silencer from Moschetta. Two days later they furnished Moschetta with a standard grey Samsonite briefcase without any exterior distinguishing marks to be used in construction of the kit. The agent, nor Suarez met with or discussed the matter with Edward Spieler.

On the morning of February 24, 1979, Suarez told the agents to expect delivery of the items that evening. The agents began surveilling Spieler's house and his place of employment. A surveillance was set-up on his place of employment when his car was observed there. After a few hours, Spieler left the building carrying a briefcase and paper bag. He placed these items in the trunk of his car, and went back into the building. Within a few minutes, he returned to the car and began backing

up. The agents blocked the path of his vehicle with one of their vehicles.

With guns drawn, they ordered Spieler out of his car. Agent Wilhjelm took the keys from the ignition, without consent, and opened the locked trunk while Spieler was being frisked at the front of the car.

Upon opening the trunk, he observed what appeared to be the stock of an AR-7 rifle, a military-type ammunition box, the briefcase, and a number of paper bags. The first container the agent searched was one of the closed paper bags. Inside he found what appeared to be silencers. He returned to the front of the car, placed Spieler under arrest, and read him his Miranda rights.

The agent then returned to the trunk. He quickly seized the briefcase and immediately opened it thinking it would contain the "assassination kit" however, it did not (App. A., *infra* at App. 1). As it turned out, this was Spieler's personal briefcase, not the one the agents had supplied. It contained handguns, personal papers and the threaded barrel for an AR-7 rifle.

Agent Wilhjelm admitted that he opened the trunk and searched the containers inside without Spieler's consent. He admitted that at no time, during the *hours* that Spieler was under surveillance, was an attempt made to secure an arrest or search warrant. (emphasis added). Lastly, the first and only time, he saw Spieler was the afternoon of his arrest.

REASONS FOR DENYING THE PETITION

The chronology of the search of the containers in the locked trunk is important. Assume arguendo, that the agent's observation of Spieler with the "briefcase" (i.e., thinking it would contain the assassination kit, even though it did not) gave him probable cause to arrest Spieler, and further that an immediate, warrantless search of the briefcase was justified. The agent did not search the "briefcase", he allegedly believed contained a dangerous instrumentality, first. To the contrary, he opened one of the many paper bags in the trunk first.

Had the agent searched the "briefcase" first, any probable cause he had would have immediately dissipated. The briefcase did not contain the suspected assassination kit, nor was it even the briefcase the agents had supplied for the construction of the kit. With the searching of the only item he arguably had probable cause to believe contained contraband, his probable cause would have vanished.

The Court of Appeals' decision was correct according to *Robbins v. California*, 453 U.S. ____ at ____ (1981) wherein it was stated,

> ". . . the Court once again encounters the argument . . . that the contents of a closed container carried in a vehicle are somehow not fully protected by the Fourth Amendment. But this argument is inconsistent with the Court's decisions in *Chadwick* and *Saunders*."

In rendering its decision, this Court noted, *"What one person may put into a suitcase, another may put*

into a paper bag." Robbins, supra at ____ (emphasis added).

Robbins made it clear that mere "paper bags" do have an expectation of privacy. As the paper bag sat closed in Spieler's trunk, the agent could not ascertain the contents thereof. The agent had no idea which of the many paper bags in Spieler's trunk might contain contraband.

Compare the container in *Robbins, supra*, which was a homemade wrapping of opaque plastic and duct tape. In the case sub judice, the "paper bag" was manufactured for the specific purpose of carrying and transporting items. It cannot be argued that brown paper wrapping is not intended to protect privacy. Consider, adult magazines are mailed in the plain brown paper wrappings to afford the subscriber privacy.

CONCLUSION

The Court should allow the Court of Appeals' affirmance of the suppression of the search of the paper bag stand.

Respectfully submitted,

STEADMAN S. STAHL, JR. and
H. DOHN WILLIAMS, JR.

December , 1981.

Appendix

APPENDIX A

Agent Wilhjelm's testimony at the motion to suppress concerning the rapidity and manner in which the briefcase was searched.

"Q Okay, continue. What did you do thereafter?

A I – right immediately after advising Mr. Spieler of his rights I noticed that our agent was hurt and I inquired about his condition and I continued a quick search of the car and of the brief case which, at this time I thought was our Government brief case; immediately examined it and opened it up because I thought it contained at this time our assassination kit.

Q What did it contain?

A It contained a number of loaded handguns and it contained money and other personal effects of Mr. Spieler's. It contained the housing for a .22 Ruger; had a barrel assembly that had been turned down and threaded. The barrel for the AR 7 had been turned down and threaded – it was in a brief case and it had been turned down and threaded, also.

Q It's your testimony that you thought that was the assassination kit, is that correct?

A Yes, sir, I did. (p. 32)

Agent Wilhjelm's testimony at the motion to supress concerning the reliability of the informant who stated that Edward M. Spieler was manufacturing silencers.

"Q How many times was he used prior to September 13 by you as a confidential informant?

A None, sir.

Q None?

A No. sir.

Q So this was the first occasion, on September 13, 1978, that you used this person as confidential informant?

A Yes, sir

Q Now did this person come to you or did you go to this person, the confidential informant?

A The source phoned me and asked me to meet him.

A And as a result of that conversation you did meet him?

A Yes, sir. I did. (p. 39)

* * *

Q Now, did this source tell you how he had this information concerning Spieler?

A He just said it was good information.

Q Good information?

A Yes, sir.

Q Did he tell you where he had gotten this information from?

A No, sir, he did not.

Q He did not give you the source of his information?

A No, sir. He did not.

Q Tell us exactly what he told you, this confidential source, on September 13th as to Spieler?

A He said that he had gotten some information. He said it was good information that Edward M. Spieler, or Edward Spieler, rather, was the manufacturer of 70 percent of the quality silencers, in the South Florida area, that he worked in a machine shop and he probably made them at night or on the weekends. That his employer or boss, I don't remember who he put it, probably didn't know about it because he was making them at night or on the weekends.

Q And that was the sum total of what you were told?

A That is in regards—plus the phone number, in regards to this particular investigation, that's essentially it.

Q And you have no knowledge of the reliability of your confidential informant's source of the information about Spieler, do you?

A No, sir. I do not.

Q When he was the first time that you ever saw someone that you later learned to be Edward Spieler?

A The first time that I personally, physically, saw Mr. Spieler was on the date of his arrest, sir, at the time I searched his car on the 24th. (pp. 41-42)